No. 87-1485

In The
Supreme Court of the United States
October Term, 1987

Arthur J. Blanchard,

Petitioner,

v.

James Bergeron, Sheriff Charles Fuselier, ABC Insurance Company, DEF Insurance Company, Barry Breaux, Oudrey Gros, Jr., Darrell Revere, Oudrey's Odyssey Lounge, and GHI Insurance Company,

Respondents.

RESPONDENTS OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RESPONDENTS OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, James Bergeron and Sheriff Charles Fuselier, respectfully pray that the petition for writ of certiorari herein be denied.

———o———

STATEMENT OF THE CASE

In the action below, Arthur Blanchard appealed the Judgment of the trial court wherein he was awarded attorney's fees of SEVEN THOUSAND FIVE HUNDRED AND NO/100 ($7,500.00) DOLLARS, plus costs and expenses in the amount of EIGHT HUNDRED EIGHTY SIX AND 92/100 ($886.92). The original jury award which was not appealed, granted to Mr. Blanchard FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS IN compensatory damages and FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS in punitive damages for the alleged use of unreasonable force in extricating Mr. Blanchard from a nightclub. The trial judge found that Mr. Blanchard's attorney was entitled to attorney's fees and costs under 42 U.S.C. 1988.

The original submission by plaintiff's counsel was for attorney's fees in the amount of THIRTY SIX THOUSAND SEVEN HUNDRED EIGHTY AND NO/100 ($36,780.00) DOLLARS and out of pocket costs and expenses of FIVE THOUSAND FIVE HUNDRED ELE-

VEN AND 92/100 ($5,511.92) DOLLARS. The trial court found that using the "lodestar" method proscribed by this Court in *Hensley v. Eckerhart,* 103 Sup. Ct. 1933 (1983), plaintiff's counsel reasonably expended 97 hours and 20 minutes (96 hours by Mr. Rosen and 1 hour and 20 minutes by his associate Ms. Dombourian). The Court further found that a reasonable hourly rate for Mr. Rosen and Ms. Dombourian was $100.00 per hour. Upon arriving at a lodestar figure of NINE THOUSAND SEVEN HUNDRED TWENTY AND NO/100 ($9,720.00) DOLLARS, the trial court adjusted Mr. Rosen's attorney's fees bill downward to SEVEN THOUSAND FIVE HUNDRED AND NO/100 ($7,500.00) DOLLARS due to his abuse of "billing judgment", the elemental nature of the litigation, and the contingency fee arrangement which provided for attorney's fees in the amount of forty percent (40%) of any judgment collected. The District Court further found that the only costs recoverable would be those designated as costs under 28 U.S.C. 1920 and therefore awarded $886.92 in costs. A copy of the District Court's reasons for judgment may be found at Appendix Page 6A herein.

On appeal to the United States Court of Appeals, Fifth Circuit, the Judgment was modified to provide attorney's fees of FOUR THOUSAND AND NO/100 ($4,000.00) DOLLARS and expenses of FOUR THOUSAND FOUR HUNDRED NINETY NINE AND 52/100 ($4,499.52) DOLLARS. The Fifth Circuit limited the award of attorney's fees to forty percent (40%) of the judgment amount ($10,000.00) as was provided for in the contingency fee contract which had been entered into by plaintiff and his attorney. The Court held that under *Johnson v. Georgia Highway Express, Inc.,* 488 F. 2d 714,

718 (5th Cir. 1974), the appellant could not be given a windfall via Section 1988 and he should not be awarded a fee greater than he was contractually bound to pay. The appellate court then found that the District Court had erred in failing to award expenses for items incidental to the attorney's services such as photocopying, long distance telephone calls and travel and therefore modified the judgment to increase the costs award to FOUR THOUSAND FOUR HUNDRED NINETY NINE AND 52/100 ($4,499.52). From this judgment the Appellant seeks the issuance of a writ of certiorari.

—o—

ARTHUR BLANCHARD'S APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

ARGUMENT

The decision below is correct and does not conflict with the decision of this court in *City of Riverside, et al v. Rivera,* 106 Sup. Ct. 2686 (1986).

I. THE DECISION BELOW IS CORRECT

The Fifth Circuit in the case at bar, limited the plaintiff's attorney's fees to the amount which he had contracted to receive. Prior to the trial of the case, plaintiff entered into a contingency fee contract with his attorney which provided for a fee of forty percent (40%) of the damages awarded in the case. (Trial Court Ruling Appendix Page 14A). The attorney's fees cap imposed by the Fifth Circuit is mandated by *Johnson v. Georgia*

Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974). In *Johnson*, Supra, the Fifth Circuit held:

> "The fee quoted to the client or the percentage of the recovery agreed to is h.lpful in demonstrating the attorney's fee expectations when he accepted the case . . . In no event, however, should the litigant be awarded a fee greater than he in contractually bound to pay, if indeed the attorneys have contracted as to the amount."

Although *Johnson*, Supra, was reported prior to enactment of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, both the House and Senate reports accompanying Section 1988 expressly endorsed the method used in *Johnson*, id., to arrive at a reasonable attorney's fee. See S. Reports, No. 94-1011, pg. 6 (1976); H.R.Rep. No. 94-158 1558, pg. 8 (1976). U.S. Code Congressional and Administrative News 1976, pg. 5908. Guided by *Johnson*, the Fifth Circuit held, that if the plaintiff enters into a contract with his attorney to handle the case for a percentage of the damages recovered, and that percentage is reasonable, then the litigant should not receive a windfall via Section 1988.

As a result of the alleged use of excessive force, Blanchard claimed that he suffered physical damage which violated his Constitutional rights. Mr. Rosen was satisfied to handle the case on a forty percent (40%) contingency basis. At the time the contract was entered into, both the plaintiff and Mr. Rosen felt that the fee agreement was reasonable. Mr. Rosen was willing to take the case for a percentage of whatever damages were recovered, if any. Had Mr. Blanchard not been successful, Mr. Rosen would have received no attorney's fees which was

the chance that he agreed to take at the time he accepted the case.

As indicated by this Court in *City of Riverside v. Rivera*, 106 Sup. Ct. 2686 (1986) "Congress enacted Section 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. See H. Rep. at 3. These victims ordinarily cannot afford to purchase legal services at the rate set by the private market. See id., at 1 ("because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts"); S. Rep. at 2 U.S. Code Congressional and Administrative News 1976, pg. 5910." 42 U.S.C. 1988 and the case law interpreting it clearly provides that a prevailing party in a civil rights action is allowed reasonable attorney's fees for the successful prosecution of his claim. Certainly, Mr. Rosen could have entered into a contingency agreement with plaintiff whereby he would collect reasonable attorney's fees upon the successful prosecution of the plaintiff's claim by submitting an itemized statement of time and a reasonable hourly rate to the district court upon conclusion of the trial. Mr. Rosen, however, chose to enter into a contingency agreement with the plaintiff whereby he would receive forty percent (40%) of the damages recovered by the plaintiff. This Court must keep in mind that the particular civil rights violation before the court alleges physical damage from which the victim potentially could have recovered a large amount of damages had he been totally successful. By allowing an attorney to contract for a percentage of the damages recovered in cases where there is a potential to recover

large sums of damages, the court does not undermine Congress' purpose in enacting Section 1988. For those cases involving meritorious civil rights claims with relatively small potential damages, the attorneys can still enter into a contingency agreement and recover reasonable attorney's fees without agreeing to accept a percentage of the damages recovered. Certainly, the attorney handling the case is in the best position to make a determination as to whether he wants to risk time and expenses in order to receive a percentage of the damages recovered or a reasonable fee as set by the court at the conclusion of the trial. To allow an attorney to contract with his client for one price and require an unsuccessful defendant to pay more than the plaintiff is contractually bound to pay is patently unfair to the defendant.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN CITY OF RIVERSIDE V. RIVERA, 106 Sup. Ct. 2686 (1986)

This Court in *City of Riverside v. Rivera*, 106 Sup. Ct. 2686 (1986) held:

> "That a rule limiting attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting Section 1988."

In *City of Riverside*, Supra, this Court affirmed an attorney's fee award of $245,456.25 in a case wherein the plaintiff recovered $33,350.00 in compensatory and punitive damages. This Court indicated that although the amount of damages recovered is one factor which the court must look at at arriving at a reasonable fee, a rule

limiting attorney's fees to a proportion of the damages awarded would seriously undermine the purpose of Section 1988. The case at bar differs from *City of Riverside*, Supra, in that the attorneys in that case did not enter into a contingency fee agreement whereby they agreed to accept the case for a specified percentage of the damages recovered. By limiting the amount of attorney's fees recoverable to a proportion of the damages recovered, the Court would be undermining the purpose of Section 1988 which is to ensure that lawyers are willing to represent persons with legitimate civil rights grievances even though they may not be able to afford legal counsel. By accepting any particular civil rights case on a percentage of the damages recovered, an attorney is making a financially motivated decision as to the method of payment, i.e. a percentage of damages recovered as opposed to a reasonable fee set by the court. As very adequately set out by the Fifth Circuit in the case at bar, neither the appellant nor congress' purpose in enacting Section 1988 were disserved by not awarding a fee greater than the litigant was contractually bound to pay. The Fifth Circuit stated:

> "In reaching this conclusion, we disserve neither the appellant nor Congress' intention to foster enforcement of this civil rights act by means of fee shifting. The appellant's contractual obligation to his attorney has been fulfilled and he has received a favorable judgment at no cost to himself. The appellant's attorney may not decide to accept another civil rights case on a contingent fee contract, but the outcome of this case should not be disincentive to handling civil rights cases upon different contractual terms." *Blanchard v. Bergeron*, 831 F. 2d 563 (5th Cir. 1987) (reprinted in the appendix at pages 1A through 5A).

Had the jury in this case awarded $1,000,000.00 as opposed to $10,000.00, it is very unlikely that this case would be in its current posture. By limiting attorney's fees to a proportion of the damages awarded as provided for by "the contract" entered into by the parties, this court would not be reversing its previous decision in *City of Riverside v. Rivera,* 106 Sup. Ct. 2688 (1986) nor would it be undermining Congress' purpose in enacting Section 1988. The Court would, however, be preventing a "windfall" to civil rights attorneys.

CONCLUSION

For the reasons set out above, this court should deny the writ requested.

Respectfully submitted,

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APPENDIX

APPENDIX 1

ARTHUR J. BLANCHARD,

Plaintiff-Appellant,

v.

James BERGERON, Sheriff Charles Fuselier, ABC Insurance Company, DEF Insurance Company, Barry Breaux, Oudrey Gros, Jr., Darrell Revere, Oudrey's Odyssey Lounge, GHI Insurance Company,

Defendants-Appellees.

No. 86-4832.

United States Court of Appeals,
Fifth Circuit.

Nov. 10, 1987.

Appeal was taken from judgment of the United States District Court for the Western District of Louisiana, Donald E. Walter, J., awarding attorney fees in civil rights action. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) successful civil rights plaintiff, who had entered into contingency agreement, was not entitled to recover total attorney fees of slightly over $40,000, and (2) expenses for photocopying, long-distance telephone calls and travel did not represent overhead which was compensated for by attorney fee award.

Affirmed as modified.

1. Civil Rights KEY 13.17(6)

Amount successful civil rights plaintiff is obligated to pay his attorney serves as cap on amount of attorney

fees to be awarded, although court is not bound to enforce contract for unreasonably high fee.

2. Civil Rights KEY 13.17(6)

Successful civil rights plaintiff, who had entered into contingency fee arrangement with his attorney that provided for a fee of 40% of the damages awarded—in this case, $4,000—was limited to a fee award of $4,000, and could not be awarded $7,500 in attorneys fees.

3. Civil Rights KEY 13.17(8)

Expenses for photocopying, long-distance telephone calls and travel did not represent overhead which was compensated for by attorney fee award in civil rights case, where fee itself was limited by parties' agreement with no provisions for expenses, and items claimed represented customary out-of-pocket charges and were not unreasonable in amount.

William W. Rosen, New Orleans, La., for plaintiff-appellant.

Edmond L. Guidry, III, Martinville, La., for defendants-appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before RUBIN, GARZA, and JONES, Circuit Judges:

EDITH H. JONES, Circuit Judge:

This appeal deals only with the district court's attorney fee award under the Civil Rights Act after the jury

awarded appellant $5,000 compensatory and $5,000 punitive damages on his § 1983 claim. Although appellant sought total attorney fees and costs slightly over $40,000, the district court awarded $7,500 in attorney fees and $886.92 for costs and expenses. We reverse, because there is a controlling contingency fee agreement between the attorney and client.

The Supreme Court has instructed that the district court has discretion in determining the amount of a fee award. *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). We will only overrule findings of fact which we find to be clearly erroneous, and the reasonableness of the total award will be judged accordingly to the abuse of discretion standard. *Curtin v. Bill Hanna Ford, Inc.,* 822 F.2d 549 (5th Cir. 1987).

FEES

The district court found that Appellant had a contingency fee arrangement with his attorney that provided for a fee of 40% of the damages awarded—in this case, $40,000. While the record is not without doubt on this point, this factual finding is not clearly erroneous and is supported by deposition testimony of appellant's trial counsel. The district court applied this factual finding as one justification among several for adjusting the requested lodestar downward.

[1, 2] Appellant contends that a contingency fee agreement should be disregarded in determining a reasonable fee in civil rights cases. Several circuits have so held. *Hammer v. Rios,* 769 F.2d 1404, 1408 (9th Cir.1985); *Cooper v. Singer,* 719 F.2d 1496, 1500 (10th Cir.1983);

Lenard v. Argento, 699 F.2d 874, 900 (7th Cir.1983); *Sargeant v. Sharp,* 579 F.2d 645, 649 (1st Cir.1978). According to appellant, we should therefore ignore his contingency agreement and, overruling other aspects of the district court decision, award him a significantly higher amount. Appellant failed to cite our circuit's holding, by which we are bound that the amount a successful civil rights plaintiff is obligated to pay his attorney serves as a cap on the amount of attorney's fees to be awarded, although the court is not bound to enforce a contract for an unreasonably high fee. *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 718 (5th Cir.1974). The reason enunciated for this limit is that an appellant will not be given a windfall via § 1988. "In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay. . . ." *Id.* The Eleventh Circuit has also followed *Johnson,* reasoning that the contract between a plaintiff and his attorney represents their notion of a reasonable fee. *Pharr v. Housing Authority,* 704 F.2d 1216, 1218 (11th Cir.1983). In reaching this conclusion, we disserve neither the appellant nor Congress's intention to foster enforcement of the Civil Rights Act by means of fee-shifting. The appellant's contractual obligation to his attorney has been fulfilled and he has received a favorable judgment at no cost to himself. The appellant's attorney may decide not to accept another civil rights case on a contingent-fee contract, but the outcome of this case should not be a disincentive to handling civil rights cases upon different contractual terms. See, e.g., the contract in *Pharr,* supra. Finally, to the extent that fee awards in civil rights cases are intended to reflect fees charged "in the marketplace" for legal services, enforcement of the contingent fee contract here is appropriate.

Because the fee award must be limited to $4,000, we need not address Appellant's claims that the district court improperly reduced the number of hours in the lodestar calculation. Moreover, any hours "billed" by law clerks or paralegals would also naturally be included within the contingency fee.

EXPENSES

[3] Appellant argues that the district court erred in not awarding expenses for items incident to the attorney services such as photocopying, long distance telephone calls and travel. The district court held that such expenses represent overhead which is compensated for by the attorney fee, rendering additional compensation unwarranted. Where, however, the fee itself has been limited by the parties' agreement with no provision for expenses, Section 1988 may be employed to permit such an award. The items claimed by appellant represent customary out-of-pocket charges in this type of litigation and are not unreasonable in amount. To these, we must add the costs of depositions, which the district court denied, but which fall within Fed.R.Civ.Proc. 54(d). *See Allen v. U.S. Steel Corp.,* 665 F.2d 689, 697 (5th Cir.1982).

Thus, the judgment of the district court is modified to provide attorney fees of $4,000 and expenses of $4,499.52.

AFFIRMED AS MODIFIED.

WEST KEY NUMBER SYSTEM

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. 83-0755

ARTHUR BLANCHARD

versus

JAMES BERGERON, ET AL

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

F I L E D
OCT 23 1986

ROBERT H. SHEMWELL, CLERK

BY s/s d d
DEPUTY

(stamp)

JUDGMENT ON ATTORNEY'S FEES AND COSTS

Pursuant to the foregoing Ruling,

IT IS ORDERED, ADJUDGED and DECREED that plaintiff shall recover the reasonable attorney's fee of $7,500.00; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff shall recover as reasonable costs and expenses the amount of $886.92.

THUS DONE AND SIGNED at Monroe, Louisiana, this 23rd day of October, 1986.

s/s Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRIT JUDGE

Judgment Entered 10-24-86

By s/s gd
Copy To Rosen
Guidry
Gibbens
Computer

(stamp)

ATTEST: A TRUE COPY

DATE October 24, 1986

ROBERT H. SHEMWELL, CLERK

BY s/s Sandra J. Dean
Deputy Clerk, U.S. District Court
Western District of Louisiana

(stamp)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. 83-0755

ARTHUR BLANCHARD

versus

JAMES BERGERON, ET AL
U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

F I L E D
OCT 23 1986

ROBERT H. SHEMWELL, CLERK

BY s/s d d
DEPUTY

(stamp)

R U L I N G

Following trial of this action brought pursuant to 42 U.S.C. § 1983, plaintiff was awarded compensatory and punitive damages totaling $10,000.[1] Now, plaintiff has moved for an award of attorney's fees, costs and expenses in accord with the judgment entered June 3, 1986. The prevailing litigant in a civil rights action ordinarily is entitled to recover attorney's fees. *Taylor v. Sterrett*, 640 F.2d 663, 668 (5th Cir. 1981). Pursuant to 42 U.S.C. § 1988, which provides in pertinent part,

> "[i]n any action or proceeding to enforce a provision of section[] . . . 1983 [of Title 42], . . . the Court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs,"

this award is left to the sound discretion of the trial court. *Id.* Here, plaintiff is a prevailing party within the meaning of this part.[2] The Court must now go about the task of determining the amount of the award.[3]

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1. Of the total judgment, defendants, James Bergeron and Charles Tuselier in his official capacity as Sheriff and Audrey's Odyssey Lounge were liable in solido for compensatory damages totaling $5,000, 90 percent and 10 percent respectively. Plaintiff's § 1983 claim was dismissed against Tuselier, thus resulting in judgement under § 1983 only against Bergeron. In keeping with this determination, the punitive damage award of $5,000 is only against Bergeron.

2. § 1988, by its terms, permits an award of attorney's fees only to a "prevailing party." *Taylor*, 640 F.2d at 669. In determining prevailing party status, the focus is "not on the form of the final judgement but on the substance of the relief." *Tasby v. Wright*, 550 F.Supp. 262, 271 (N.D. Tx. 1982).

3. The circuit employs the "lodestar" method of determining such amount. *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir.

(Continued on following page)

The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1937 (1983). As noted by the Supreme Court in *Riverside v. Rivera*, slip op. no.85-224 (June 27, 1986), the congressional intent for enacting this provision was to allow plaintiffs to enforce civil rights laws, especially under the adverse circumstances of an unpopular cause or where the amount of damages at stake would not otherwise make it feasible for them to do so.[4] *Id.* at 15. The expressed purposes of this provision are met in the present matter; nevertheless, § 1983 was not intended to be a windfall for attorneys, for it is only "reasonable" fees that are recoverable.

A fee applicant must exercise "billing judgment" with respect to the number of hours for which he seeks com-

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1983). The Court must articulate the basis for its award of attorney's fees, thus insuring meaningful appellate review of its discretion. *Harkless v. Sweeny Independent School District*, 608 F.2d 594, 596 (5th Cir. 1979). A meaningless exercise in parroting *Johnson's* criteria is not required *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974); instead, this analysis is to assure that the Court has arrived at a just compensation based on appropriate standards. *Tasby*, 550 F.Supp. at 275.

4. Quoting the Senate Reports, the Supreme Court noted, "[F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. . . . If private citizens are to be able to assert their civil rights, and if those who violate the National's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." *See* S.Rep. No. 94-1011, p. 2 (1976) (hereafter Senate Report). *Rivera*, slip op. at 15.

pensation to ensure reasonableness.[5] *Rivera,* slip op. at 7 n. 4. "Billing judgment" excludes from a fee request "excessive, redundant, or otherwise unnecessary" hours. *Id.* Moreover, the applicant bears the burden of presenting an adequate accounting of his time to allow the court to make this determination, failing such, the claim for fees shall be denied.[6] *Hensley,* 103 S.Ct. at 1941 and n. 12. In this matter, plaintiff's records are often inadequate and difficult to decipher. Many of his time sheets fail to inform the Court of how the time billed was spent; these vague claims are, therefore, Denied. However, the Court can evaluate some of the billed hours, for which recovery will be allowed.

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5. "*Hensley* requires a fee applicant to exercise 'billing judgment' not because he should necessarily be compensatd for less than the actual number of hours spent litigating a case, but because the hours he does seek compensation for must be reasonable. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. . . ." *Id.* at 424.

6. The applicant must submit a full and accurate accounting of his time; the accounting must be based on contemporaneous records; and the accounting must give specifics such as the dates and nature of the work performed. *Hensley,* 103 S.Ct. at 1938, 1940. The record should be sufficiently detailed to enable the Court to determine what time was spent on different claims; it must also be detailed enough to enable the Court to determine if plaintiff's attorney is claiming compensation for hours that are redundant, excessive, or otherwise unnecessary, and to determine if the attorney has exercised "billing judgment" in submitting the fee application. *Id.* at 1938-41. Counsel should at least identify the general subject matter of his time expenditures, which plaintiff has repeatedly failed to do. *See Nadeau v. Helgemore,* 581 F.2d 275, 279 (1st Cir. 1978), "('As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims')."

Recognizing that prevailing parties in civil rights actions should ordinarily recover attorney's fees under § 1988 unless special circumstances would render such an award unjust, defendant contends the case at bar is one entailing such special circumstances. Defendant argues that plaintiff did not exercise "billing judgment" in submitting his fee request and, thus, should be denied recovery. The Court agrees that billing judgment was abused in this matter, where plaintiff claimed $42,291.92 in fees. Plaintiff did not limit his request to striking redundant or unnecessary hours. For this simple § 1983 action, plaintiff has submitted a request for an award of attorney's fees that represents in excess of 385 hours—for counsel, two co-counsel, paralegals and law clerks. This application is unreasonable, but it does not fit within one of the recognized exceptions barring recovery.[7] However, the Court will consider this abuse of "billing judgment" in adjusting the award after the "lodestar" is calculated.

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7. The Fifth Circuit has recognized such special circumstances as would render an award under § 1988 unjust. *Taylor,* 640 F.2d at 668. Nevertheless, § 1988 requires a strong showing of special circumstances to justify denying an award of attorney's fees and costs to the prevailing party in a § 1983 claim. *Riddell v. National Democratic Party,* 624 F.2d 539, 543 (5th Cir. 1980). Arising only in unusual situations, special circumstances sufficient to deny an award of attorney's fees include a plaintiff's § 1983 claim which was essentially a tort claim for private monetary damages and an action where plaintiff's complaint was not instrumental in remedying a civil rights violation. *Id.* at 544-45. Also, the district court in *Clay v. Harris,* 583 F.Supp. 1314 (N.D. Ind. 1984), recognized another special circumstance for denying relief under § 1988 where a plaintiff prevailed but an award of attorney's fees would encourage numerous trivial lawsuits. Despite these exceptions, the jury clearly held that plaintiff's claim fell under the Constitution and § 1983. The Court holds the above special circumstances are not applicable to the case at bar.

The Supreme Court in *Hensley,* 103 S.Ct. 1933, announced certain guidelines for calculating a reasonable attorney's fee. *Hensley* stated that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 1939. This figure, commonly referred to as the "lodestar," is the starting point in calculating a reasonable fee as contemplated by § 1988. *Rivera,* at 5. In reaching this "lodestar," the Supreme Court cautioned that "[t]he district court . . . should exclude from this initial fee calculation hours that were not reasonably expended" on the litigation. *Hensley,* 103 S.Ct. at 1939-40.

In addition to those hours already excluded as unidentifiable, the Court also excludes hours billed in relation to a pendent state claim. Time spent researching issues concerning this claim which are distinguishable from his § 1983 are not recoverable.[8] Hours devoted specifically to this claim did not aid the outcome of the § 1983 action and are not reasonable within the meaning of § 1988.

To further aid the Court in making this assessment, the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), identifies twelve (12) factors to be considered in calculating a reasonable attorney's fee.[9] Here, neither the facts of this case nor the issues of law were novel or complex. Plaintiff's counsel rendered satisfactory service, but this was not a case of "exceptionable success." The case was filed in 1983, came to trial in 1986, and required less than three (3) days of trial. Motion practice in the course of the litigation was minimal. Preclusion of other employment should have been non-existent; time limitations were not a problem in this litigation. Of the hours claimed by plaintiff, the Court, after the above exclusions, will allow recovery for only 97 hours and 20 minutes—96 hours by Mr. Rosen and 1 hour and 20 minutes by co-counsel, Ms. Dombourian.

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8. Claims for time spent researching Louisiana damages and pendent jurisdiction did not aid the prosecution of plaintiff's § 1983 claim.

9. While the statute itself does not explain what constitutes a reasonable fee, both the House and Senate Reports accompanying § 1988 expressly endorse the analysis set forth in *Johnson,*

(Continued on following page)

Calculation of the "lodestar" also involves the determination of a reasonable hourly rate. Plaintiff claims an hourly rate ranging from $100 through $150 per hour depending on senority—$150/hr. for 96 hours and $125/hr. for 1 hour and 20 minutes. Defendant argues these rates are unreasonable, suggesting a rate between $65 and $100 per hour. Taking notice of the customary fees in the community, the Court agrees that plaintiff's rates are high and holds that $100/hour is a reasonable rate.

After determining the "lodestar," which is presumed to be the reasonable fee contemplated by § 1988, *Rivera,*

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supra. *Rivera* at 5. See Senate Report, p. 6; H.R. Rep. No. 94-1558, p. 8 (1976) (hereafter House Report). "These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d, at 717-719."

at 5, the *Hensley* court suggested other considerations that might lead the district court to adjust the lodestar figure upward or downward. *Id.* at 1939-40. Here, as noted earlier, plaintiff's abuse of "billing judgment" requires that the lodestar figure be adjusted downward. Further supporting this reduction is the elemental nature of this litigation and the contingency fee arrangement entered in this matter.[10] The lodestar of $9,720 is adjusted downward to $7,500.00.

There is also the question of costs which has yet to be determined. Plaintiff contends it is entitled to recover as costs photocopying expenses, travel expenses, mailing expenses, expert witness fees, deposition costs, paralegal and law clerk expenses. Defendant opposes this argument, suggesting only those costs specifically enumerated in 28 U.S.C. § 1920 or other statutes are recoverable. The Court agrees with defendants.

Following the recent Fifth Circuit opinion of *IWA v. Champion International Corp.*, 790 F.2d 1174 (5th Cir. 1986), § 1988 provides only for the recovery of attorney's fees by the prevailing party but does not include other expenses and cost of the litigation. *Id.* Even though the specific holding of *IWA, supra,* only concerned expert witness fees, the Court suggests a much more sweeping effect. *Id.* Noting the broad expanse of *IWA, supra,* this Court holds only those items recoverable as costs under

10. The contingency fee arrangement provided for 40 percent of whatever is collected—$4,000. Plaintiff's counsel will not be given a windfall via § 1988.

§ 1920[11] or other specific statutes are reasonable. Other costs are not recoverable.[12]

In light of the strong dissent by Judge Rubin in *IWA*, 790 F.2d at 1181, the Court also concludes the recovery of costs other than the ordinary witness fees and docket fees would be unreasonable under § 1988 and *Johnson, supra.* As to photocopying expenses, counsel have already been paid for preparing the memorandum or for researching the case that is being duplicated or the deposition copied. Similarly, travel costs, mailing costs and long-distance expenses amount to the recovery of the type of expenses usually associated with the practice of law and covered overhead expenses. Noting the simplicity of this matter, paralegal and law clerk fees were not necessitated so as to be reasonable. Whether excluded under *IWA, supra,* or by a reasonableness determination, items for costs and expenses are limited to those specifically enumerated. Of the $5,511.92 claimed by plaintiff, counsel may recover costs and expenses in the amount of $886.92.

THUS DONE AND SIGNED at Monroe, Louisiana this 23d day of October, 1986.

11. § 1920 provides, "A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, and costs of special interpretation services under section 1828 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

12. Necessarily included within this exclusion are expenses for paralegals, secretaries and other support personnel.

s/s Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT:

DATE 10-23-86
BY d d

TO: Rosen
Guidry III
Gibbins

(stamp)

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NO. 83-0755

ARTHUR BLANCHARD

versus

JAMES BERGERON, ET AL

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

FILED
MAY 30 1986

ROBERT H. SHEMWELL, CLERK
BY d d
DEPUTY

(stamp)

JUDGMENT

After trial before the Court and a jury, commencing on May 20, 1986, and concluding on May 22, 1986, Honorable Donald E. Walter, District Judge, presiding, and the Court having instructed the jury to find a general verdict and to answer special interrogatories, and the jury having rendered a verdict and answered these interrogatories, which have been filed in the record;

IT IS ORDERED, ADJUDGED and DECREED that the plaintiff, Arthur Blanchard, recover compensatory damages from defendants, James Bergeron and Charles Fuselier in his official capacity as Sheriff of St. Martin

Parish liable for ninety percent (90%), and Oudrey's Odyssey Lounge liable for ten percent (10%), in the amount of Five Thousand and No/100 Dollars ($5,000.00), with interest thereon at the rate provided by law from the date this action was filed;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff recover punitive damages from defendant, James Bergeron, in the amount of Five Thousand and No/100 Dollars ($5,000.00), with interest thereon at the rate provided by law from the date judgment is entered;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's 42 U.S.C. § 1983 claim against defendant Charles Fuselier is Dismissed, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff's state law claims against defendants, Oudrey Gros, Jr., and Darrell Revere, are Dismissed, with prejudice;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff recover from defendant, James Bergeron, reasonable attorney fees to be later fixed by the Court; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff recover from defendants, James Bergeron and Charles Fuselier in his official capacity, and Oudrey's Odyssey Lounge, reasonable costs to be later fixed by the Court.

JUDGMENT READ and SIGNED in Monroe, Louisiana, this 30th day of May, 1986.

s/s Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

Judgment Entered 6-3-86
By L J Sprott
Copy To _____

_____

_____

(stamp)

APPENDIX 4

42 U.S.C. § 1988.

Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (As amended October 21, 1980, P.L. 96-481, Title II, § 205(c), 94 Stat. 2330.)